Central Law Journal.

ST. LOUIS, MO., SEPTEMBER 29, 1916.

DOES A STATUTE DENYING TO INSURANCE COMPANY DEFENSE OF MISREPRESENTATION, WHERE POLICY IS ISSUED WITHOUT MEDICAL EXAMINATION, APPLY TO ACCIDENT INSURANCE?

Justice Pitney's advice to appellate judges at the last meeting of the American Bar Association, not to make excursions into the record unaccompanied by counsel, might well be applied to questions of law as well as fact. For while some judges may have the ability as well as the time to obtain a complete grasp of all the law and facts of a particular case so as to be able to reach an independent judgment unassisted by counsel, yet in the great majority of cases this is not true and such independent researches are usually superficial or go off upon some hobby or pet theory of the judge himself. This fact is well illustrated by the opinion of the Supreme Court of Minnesota in the recent case of McAlpine v. Fidelity & Casualty Co., 158 N. W. 967, in which the court in construing the meaning of a certain statute, astonished counsel on both sides by stating that "from the record" it was evident that counsel had not discovered the real solution of the problem involved in a proper construction of the law in question and that the court itself would proceed to give the proper solution.

The action in this case was on an accident policy for accidental death of plaintiff's husband. One of the defenses interposed was that Mr. McAlpine misrepresented his physical condition.

There are two sections of the Minnesota Insurance code that seemed to be applicable. Section 1623 provided:

"No oral or written misrepresentation made by the assured, or in his behalf, in the negotiation of insurance, shall be deemed material, or defeat or avoid the policy, or prevent its attaching, unless made with intent to deceive and defraud, or unless the matter misrepresented increases the risk of loss."

The defendant relied on this section and secured from the trial court an instruction in conformity thereto. The plaintiff, however, relied on Section 1693, which provided as follows:

"In any claim upon a policy issued in this State without previous medical examination, or without the knowledge or consent of the insured, or, in case of a minor, without the consent of his parent, guardian, or other person having his legal custody, the statements made in the application as to the age, physical condition, and family history of the insured shall be valid and binding upon the company, unless willfully false or intentionally misleading."

A verdict having been rendered for defendant, the trial court repented its "error" and granted a new trial on the theory that Section 1693 covered accident policies, and, being issued "without previous medical examination," should not be avoided for misrepresentation unless "willfully false or intentionally misleading."

The briefs of counsel, as our investigation has proved, argued the question along the line of the distinction alleged and denied as existing between life and accident insurance. Defendant contended that Section 1693 being found in a chapter entitled "Life Insurance Companies," was presumed to apply only to life insurance, while plaintiff countered by showing that such chapter applied to insurance "conditioned upon the cessation of human life," and as the policy sued upon was for "accidental death," it came within such definition and properly classified as life insurance, citing Logan v. Casualty Co., 146 Mo. 115; Johnson v. Fidelity & Casualty Co. (Mich.), 151 N. W. 593.

But the Supreme Court of Minnesota, ignoring the contentions of counsel, proposes a solution of its own which, to say the

least, is very novel and sufficiently justifies its claim to originality in reaching the solution that a policy for accidental death was not such a policy of insurance which the legislature intended to favor in passing the section known as 1693. On the contrary, the court found that what the legislature had in mind in passing that section was "industrial" policies.

The court then covers over a page of valuable print paper in showing the wide extent of its research into the history, benefits and social importance of industrial insurance, all of which, while interesting, does not seem to have any bearing on the case except so far as the court's argument shows that such insurance would be subject to abuses unless carefully regulated by law, and that section 1693 was intended to prevent imposition on the ignorant and unsophisticated, to whom such policies were usually sold. The court said: "At the best, it is expensive insurance giving needed help in time of distress. Those taking it are often unlettered, usually have no knowledge of the nature of an insurance contract or the effect of a misstatement, and however honest their purpose, they may express themselves inaccurately or may speak English indifferently, and may be misunderstood, or the soliciting agents who get their compensation from collections and gain through an increase of policies may not be cautious or conscientious. It was the purpose of the legislature to prevent misstatements as to age, physical condition and family history avoiding policies of this kind except when 'willfully false or intentionally misleading.' It was not its purpose to favor ordinary accident policies or to put them upon a more advantageous basis than ordinary life policies."

What the court says about industrial insurance is probably true, but its conclusion is clearly a *non sequitur*. If the legislature intended to favor only industrial policies it was easy for it to have done so, but if the intention was also to include accident policies, it could not have been done in a better way than by a general statute of this kind. And if space permitted it might easily be shown, that the same abuses are inherent in accident insurance as in industrial insurance and that the policyholder under an accident policy in the respects mentioned in the statute above noted, stands in hardly as less need of protection from the abuse of the defense of alleged misrepresentations as the more easily imposed upon industrial policyholder.

Statutes of a similar kind to that construed in the McAlpine case have been passed in many other States and we should regard it as unfortunate if courts generally should take such a narrow view of a remedial statute intended to protect policyholders. It is very easy for insurance companies to make their own physical examinations and thus protect both themselves and their policyholders from the latter's ignorance, forgetfulness or mistakes.

A. H. R.

NOTES OF IMPORTANT DECISIONS.

COMMERCE—HAULING GRAVEL FOR REPAIR OF RAILROAD ACROSS STATE LINES.—The Supreme Court of North Dakota held that a railroad in hauling cars containing gravel for ballasting its track was engaged in interstate commerce, if the ballasting was to be done in another State, and an employe injured in such hauling must sue under the Federal Employers' Liability Act. Hein v. Great Northern R. Co., 159 N. W. 14.

The State court refers to controlling federal decision that hauling empty freight cars from one State to another is interstate commerce within the meaning of the federal employers' liability statute. See among other cases, N. C. Ry. Co. v. Zachary, 232 U. S. 248, Ann. Cas. 1914C, 159.

The State court says that, "if, hauling empty cars across State lines is interstate commerce,

hauling loaded ones certainly is." But does this necessarily follow? The theory of the hauling of empty cars being interstate commerce is, not that this is true in a general sense, but only in the sense of safety appliance and federal employers' liability acts. Empty cars going from one State to another may be presumed to be going after traffic. Cars loaded with gravel to be used by the carrier on its own track are accompanied by no such presumption. The going or returning is an immaterial incident in work. To bring such movement into interstate commerce it would be necessary to say that cars are to be preserved as instrumentalities of commerce. This being so, it would make no difference whether the cars did or did not cross State lines. Sc the question comes down to whether a car hauling gravel for the repair of a railroad in interstate commerce is as to employes thereon under the federal Employers' Liability Act? We do not believe this yet has been held.

CRIMINAL LAW—WAIVER OF ARRAIGNMENT AND PLEA.—The Supreme Court of Colorado reaffirms old decision that where a person goes to trial without objection to his not having been arraigned, though there is no claim to prejudice from his not having been arraigned, the verdict cannot be allowed to stand. To this ruling two judges dissent. People v. Lawton, 158 Pac. 1099.

The dissentients admit former ruling by Colorado court, but claim that two, at least, of the cases referred to were decided prior to a statute which another of them claims to have no bearing on the question. The dissent claims that it does change the old rule as the words forbidding reversal for any defect which does not tend to prejudice substantial rights on the merits are general in their sweep.

Principally the dissent is bottomed on the rule in Garland v. State, 232 U. S. 642, which held that it was apparent lack of arraignment and plea and wrought no prejudice, and should not work a reversal. A great number of other decisions are cited as overruling elder cases, the Garland case itself being of this sort. It was said in that case that this technical objection was enforced before "with improved methods of procedure and greater privileges to accused, any reason for strict adherence to the mere formalities of trial would seem to have passed away."

It seems to us that a right so easily secured as merely to demand it, makes waiver by estoppel, if it is not demanded, especially if to grant it is to follow a mere formality.

CARRIER—WILLFUL TORT BY SERVANT TO ONE RIDING ON FREE PASS.—The Supreme Court of South Carolina, following federal decision as to stipulated exemption of a carrier from liability to employe riding on a "free pass," notwithstanding the negligence of the carrier or its servants, holds that such a stipulation does not extend to willful acts of the carrier's servant resulting in injury. Turman v. Seaboard Air Line Ry., 89 S. E. 655.

The railroad relied on Railroad v. Prentice, 147 U. S. 108, which held that mere willfulness by a servant did not authorize punitive damages against the master, unless there was knowledge before or ratification afterwards, and, this case being governed by federal law, the willfulness was the same as negligence, because neither knowledge before by employer nor ratification afterwards was shown.

The court said that though the carrier was not "liable to be mulcted in punitive damages, it does not follow that it is not liable to compensate the passenger for any injury of the body which she suffered by the accident. * * * The contract does not employ the word 'willfulness.' It does employ the word 'negligence.' It saves the corporation from liability under any circumstances, whether by negligence of agents or otherwise. That is to say, the plaintiff agreed that the corporation should not be liable to her for accidents resulting from the negligence of the engineer or for accidents resulting from other causes. * * * It is significant that the word 'willfulness' was not employed. We shall not assume that the corporation intended to make itself irresponsible for the intended wrongful acts of its servants unless that plainly appears from the words it has used. But if it did so appear, the allowance of such a contract would militate against good order and would be against public policy."

It seems to us that the only fair construction of the Prentice case is, that acts of employes of a corporation are to be regarded from the standpoint of negligence, unless they are directed or ratified. As to a stipulation specially excepting willfulness being against public policy, we think it only would be such when it refers to acts previously or subsequently ratified, otherwise these are but negligence, as the Prentice case in effect holds.

THE OUTLOOK FOR INTERNATIONAL LAW.*

The incidents of the great war now raging affect so seriously the very foundations of international law that there is for the moment but little satisfaction to the student of that science in discussing specific rules. Whether or not Sir Edward Carson went too far in his recent assertion that the law of nations has been destroyed, it is manifest that the structure has been rudely shaken. The barriers that statesmen and jurists have been constructing laboriously for three centuries to limit and direct the conduct of nations toward each other, in conformity to the standards of modern civilization, have proved too weak to confine the tremendous forces liberated by a conflict which involves almost the whole military power of the world and in which the destinies of nearly every civilized state outside the American continents are directly at stake.

The war began by a denial on the part of a very great power that treaties are obligatory when it is no longer for the interest of either of the parties to observe them. The denial was followed by action supported by approximately one-half the military power of Europe and is apparently approved by a great number of learned students and teachers of international law, citizens of the countries supporting the view. This position is not an application of the doctrine *sic stantibus rebus* which justifies the termination of a treaty under circumstances not contemplated when the treaty was made so that it is no longer justly applicable to existing conditions. It is that under the very circumstances contemplated by the treaty and under the conditions for which the treaty was intended to provide the treaty is not obligatory as against the interest of the contracting party.

This situation naturally raises the question whether executory treaties will continue to be made if they are not to be binding, and requires consideration of a system of law under which no conventional obligations are recognized. The particular treaty which was thus set aside was declaratory of the general rule of international law respecting the inviolability of neutral territory; and the action which ignored the treaty also avowedly violated the rule of law; and the defense is that for such a violation of the law the present interest of a sovereign state is justification. It is plain that the application of such a principle to a matter of major importance at the beginning of a long conflict must inevitably be followed by the setting aside of other rules as they are found to interfere with interest or convenience; and that has been the case during the present war. Many of the rules of law which the world has regarded as most firmly established have been completely and continuously disregarded, in the conduct of war, in dealing with the property and lives of civilian non-combatants on land and sea and in the treatment of neutrals. Alleged violations by one belligerent have been asserted to justify other violations by other belligerents. The art of war has been developed through the invention of new instruments of destruction and it is asserted that the changes of conditions thus produced make the old rules obsolete. It is not my purpose at this time to discuss the right or wrong of these declarations and actions. Such a discussion would be quite inadmissible on the part of the presiding officer of this meeting. I am stating things which whether right or wrong have unquestionably happened, as bearing upon the branch of jurisprudence to which this society is devoted. It seems that if the violation of law justifies other violations, then the law is destroyed and there is no law; that if the discovery of new ways of doing a thing prohibited justifies the doing of it,

*We have been requested to publish Mr. Root's very thoughtful and suggestive address delivered at the last meeting of the American Society of International Law, Dec. 28, 1915, at the city of Washington.

then there is no law to prohibit. The basis of such assertions really is the view that if a substantial belligerent interest for the injury of the enemy come in conflict with a rule of law, the rule must stand aside and the interest must prevail. If that be so it is not difficult to reach the conclusion that for the present at all events in all matters which affect the existing struggle, international law is greatly impaired. Nor can we find much encouragement to believe in the binding force of any rules upon nations which observe other rules only so far as their interest at the time prompts them. Conditions are always changing and a system of rules which cease to bind whenever conditions change should hardly be considered a system of law. It does not follow that nations can no longer discuss questions of right in their diplomatic intercourse, but upon such a basis it seems quite useless to appeal to the authority of rules already agreed upon as just and right and their compelling effect because they have been already agreed upon.

When we recall Mansfield's familiar description of international law as "founded upon justice, equity, convenience, the reason of the thing, and confirmed by long usage," we may well ask ourselves whether that general acceptance which is necessary to the establishment of a rule of international law may be withdrawn by one of several nations and the rule be destroyed by that withdrawal so that the usage ceases and the whole subject to which it relates goes back to its original status as matter for new discussion as to what is just, equitable, convenient and reasonable.

When this war is ended, as it must be some time, and the foreign offices and judicial tribunals and publicists of the world resume the peaceable discussion of international rights and duties, they will certainly have to consider not merely what there is left of certain specific rules, but also the fundamental basis of obligation upon which all rules depend. The civilized world will have to determine whether what we call international law is to be continued as a mere code of etiquette or is to be a real body of laws imposing obligations much more definite and inevitable than they have been heretofore. It must be one thing or the other. Although foreign offices can still discuss what is fair and just and what is expedient and wise, they cannot appeal to law for the decision of disputed questions unless the appeal rests upon an obligation to obey the law. What course will the nations follow?

Vague and uncertain as the future must be, there is some reason to think that after the terrible experience through which civilization is passing there will be a tendency to strengthen rather than abandon the law of nations. Whatever the result may be, the world will have received a dreadful lesson of the evils of war. The sacrifice of millions of lives, millions homeless and in poverty, industry and commerce destroyed, overwhelming national debts,—all will naturally produce a strong desire to do something that will prevent the same thing happening again.

While the war has exhibited the inadequacy of international law, so far as it has yet developed, to curb those governmental policies which aim to extend power at all costs, it has shown even more clearly that little reliance can be placed upon unrestrained human nature, subject to specific temptation, to commit forcible aggression in the pursuit of power and wealth. It has shown that where questions of conduct are to be determined under no constraint except the circumstances of the particular case the acquired habits of civilization are weak as against the powerful, innate tendencies which survive from the countless centuries of man's struggle for existence against brutes and savage foes. The only means yet discovered by man to limit those tendencies consist in the establishment of law, the setting up of principles of action and definite rules of conduct which cannot be violated by the individual without injury

to himself. That is the method by which the wrongs naturally flowing from individual impulse within the state have been confined to narrow limits. That analogy, difficult as it is to maintain in view of the differences between the individual who is subject to sovereignty and the nation which is itself sovereign, indicates the only method to which human experience points to avoid repeating the present experience of these years of war consistently with the independence of nations and the liberty of individuals. The Pax Romana was effective only because the world was subject to Rome. The Christian Church has been urging peace and good-will among men for nineteen centuries, and still there is this war. Concerts of Europe and alliances and ententes and skillful balances of power all lead ultimately to war. Conciliation, good-will, love of peace, human sympathy, are ineffective without institutions through which they can act. Only the possibility of establishing real restraint by law seems to remain to give effect to the undoubted will of the vast majority of mankind.

In the effort to arrange the affairs of the world so that they will not lead to another great catastrophe men will therefore turn naturally toward the re-establishment and strengthening of the law of nations. How can that be done? How can the restraints of law be made more effective upon nations?

It is not difficult to suggest some things which will tend in that direction.

Laws to be obeyed must have sanctions behind them; that is to say, violations of them must be followed by punishment. That punishment must be caused by power superior to the law breaker; it cannot consist merely in the possibility of being defeated in a conflict with an enemy; otherwise there would be no law as between the strong and the weak. Many states have grown so great that there is no power capable of imposing punishment upon them except the power of collective civilization outside of the offending state. Any exercise of that power must be based upon public opinion. It cannot rest merely upon written agreements or upon the accidental dictates of particular interests. It must proceed from general, concurrent judgment and condemnation. When that exists punishment may be inflicted either by the direct action of governments, forcible or otherwise, or by the terrible consequences which come upon a nation that finds itself without respect or honor in the world and deprived of the confidence and good-will necessary to the maintenance of intercourse. Without such an opinion behind it no punishment of any kind can be imposed for the violation of international law.

For the information of such a general opinion, however, questions of national conduct must be reduced to simple and definite form. Occasionally there is an act the character of which is so clear that mankind forms a judgment upon it readily and promptly, but in most cases it is easy for the wrongdoer to becloud the issue by assertion and argument and to raise a complicated and obscure controversy which confuses the judgment of the world. There is but one way to make general judgment possible in such cases. That is by bringing them to the decision of a competent court which will strip away the irrelevant, reject the false, and declare what the law requires or prohibits in the particular case. Such a court of international justice with a general obligation to submit all justiciable questions to its jurisdiction and to abide by its judgment is a primary requisite to any real restraint of law.

When we come to consider the working of an international court, however, we are forced to realize that the law itself is in many respects imperfect and uncertain. There is no legislature to make laws for nations. There is no body of judicial decisions having the effect of precedent to declare what international laws are. The process of making international law by usage and general acceptance has been necessarily so slow that it has not kept pace with

the multiplying questions arising in the increasing intercourse of nations. In many fields of most fruitful controversy different nations hold tenaciously to different rules, as, for recent example, upon the right of expatriation, upon the doctrine of continuous voyages, upon the right to transfer merchant vessels after the outbreak of a war. Yet any attempt to maintain a court of international justice must fail unless there are laws for the court to administer. Without them the so-called court would be merely a group of men seeking to impose their personal opinions upon the states coming before them. The lack of an adequate system of law to be applied has been the chief obstacle to the development of a system of judicial settlement of international disputes. This is well illustrated by the history of the Second Hague Conference treaty for an international prize court. The conference agreed to establish such a court and provided in article 7 of the treaty that in the absence of special treaty provisions governing the case presented "the court shall apply the rules of international law. If no generally recognized rule exists the court shall give judgment in accordance with the general principles of justice and equity." When the question of ratifying this treaty was presented to the powers whose delegates had signed it some of them awoke to the fact that upon many subjects most certain to call for the action of a court there was no general agreement as to what the rules of international law were, and that different nations had different ideas as to what justice and equity would require and that each judge would naturally follow the views of his own country. Accordingly the Conference of London was called, and met in December, 1908. In that Conference the delegates of the principal maritime powers came to an agreement upon a series of questions and they embodied their agreement in the 71 articles of the Declaration of London. If that declaration had been ratified by all the powers in the conference it would doubtless have been accepted as a statement of the international law upon the subjects covered. But it was not ratified, and so the Prize Court treaty remains ineffective because the necessary basis for the action of the court is wanting. It is plain that in order to have real courts by which the legal rights of nations can be determined and the conduct of nations can be subjected to definite tests there must be a settlement by agreement of old disputes as to what the law ought to be and provision for extending the law over fields which it does not now cover. One thing especially should be done in this direction. Law cannot control national policy, and it is through the working of long-continued and persistent national policies that the present war has come. Against such policies all attempts at conciliation and good understanding and good-will among the nations of Europe have been powerless. But law, if enforced, can control the external steps by which a nation seeks to follow a policy and rules may be so framed that a policy of aggression cannot be worked out except through open violations of law which will meet the protest and condemnation of the world at large, backed by whatever means shall have been devised for law enforcement.

There is another weakness of international law as a binding force which it appears to me can be avoided only by a radical change in the attitude of nations toward violations of the law.

We are all familiar with the distinction in the municipal law of all civilized countries between private and public rights and the remedies for the protection or enforcement of them. Ordinary injuries and breaches of contract are redressed only at the instance of the injured person, and other persons are not deemed entitled to interfere. It is no concern of theirs. On the other hand, certain flagrant wrongs the prevalence of which would threaten the order and security of the community are deemed to be everybody's business. If, for example, a man be robbed or assaulted the injury is deemed not to be done to him

alone but to every member of the state by the breaking of the law against robbery or against violence. Every citizen is deemed to be injured by the breach of the law because the law is his protection and if the law be violated with impunity his protection will disappear. Accordingly, the government, which represents all its citizens, undertakes to punish such action even though the particular person against whom the injury was done, may be content to go without redress. Up to this time breaches of international law have been treated as we treat wrongs under civil procedure, as if they concerned nobody except the particular nation upon which the injury was inflicted and the nation inflicting it. There has been no general recognition of the right of other nations to object. There has been much international discussion of what the rules of law ought to be and the importance of observing them in the abstract, and there have been frequent interferences by third parties as a matter of policy upon the ground that specific, consequential injury to them might result from the breach, but, in general, states not directly affected by the particular injury complained of have not been deemed to have any right to be heard about it. It is only as disinterested mediators in the quarrels of others or as rendering good offices to others that they have been accustomed to speak, if at all. Until the First Hague Conference that form of interference was upon sufferance. In the convention for the Pacific Settlement of International Disputes, concluded at that conference, it was agreed that in case of serious trouble or conflict before an appeal to arms the signatory powers should have recourse to the good offices or mediation of foreign powers, and article 3 also provided: "Independent of this recourse the signatory powers recommend that one or more powers strangers to the dispute should on their own initiative, and as far as circumstances may allow, offer their good offices or mediation to the states at variance. Powers strangers to the dispute have a right to offer good offices or mediation even during the course of hostilities. The exercise of this right can never be regarded by one or other of the parties in conflict as an unfriendly act." These provisions are a considerable step toward a change in the theory of the relation of third powers to an international controversy. They recognize such an independent interest in the prevention of conflict as to be the basis of a right of initiative of other powers in an effort to bring about a settlement. It still remains under these provisions, however, that the other powers assert no substantive right of their own. They are simply authorized to propose an interference in the quarrels of others to which they are deemed to be strangers. The enforcement of the rules of international law is thus left to the private initiative of the country appealing to those rules for protection and the rest of the world has in theory and in practice no concern with the enforcement or nonenforcement of the rules.

If the law of nations is to be binding, if the decisions of tribunals charged with the application of that law to international controversies are to be respected, there must be a change in theory, and violations of the law of such a character as to threaten the peace and order of the community of nations must be deemed to be a violation of the right of every civilized nation to have the law maintained and a legal injury to every nation. When a controversy arises between two nations other nations are indeed strangers to the dispute as to what the law requires in that controversy, but they cannot really be strangers to a dispute as to whether the law which is applicable to the circumstances shall be observed or violated. Next to the preservation of national character the most valuable possession of all peaceable nations great and small is the protection of those laws which constrain other nations to conduct based upon principles of justice and humanity. Without that protection there is no safety for the small state except in the shifting currents of policy

among its great neighbors, and none for a great state, however peaceable and just may be its disposition, except in readiness for war. International laws violated with impunity must soon cease to exist and every state has a direct interest in preventing those violations which if permitted to continue would destroy the law. Wherever in the world the laws which should protect the independence of nations, the inviolability of their territory, the lives and property of their citizens, are violated, all other nations have a right to protest against the breaking down of the law. Such a protest would not be an interference in the quarrels of others. It would be an assertion of the protesting nation's own right against the injury done to it by the destruction of the law upon which it relies for its peace and security. What would follow such a protest must in each case depend upon the protesting nation's own judgment as to policy, upon the feeling of its people and the wisdom of its governing body. Whatever it does, if it does anything, will be done not as a stranger to a dispute or as an intermediary in the affairs of others, but in its own right for the protection of its own interest. Upon no other theory than this can the decisions of any court for the application of the law of nations be respected, or any league or concert or agreement among nations for the enforcement of peace by arms or otherwise be established, or any general opinion of mankind for the maintenance of law be effective.

Can any of these things be done? Can the law be strengthened and made effective? Imperfect and conflicting as is the information upon which conjecture must be based, I think there is ground for hope that from the horrors of violated law a stronger law may come. It was during the appalling crimes of the Thirty Years' War that Grotius wrote his "De Jure Belli ac Pacis" and the science of international law first took form and authority. The moral standards of the Thirty Years' War have returned again to Europe with the same dreadful and intolerable consequences. We may hope that there will be again a great new departure to escape destruction by subjecting the nations to the rule of law. The development and extension of international law has been obstructed by a multitude of jealousies and supposed interests of nations each refusing to consent to any rule unless it be made most favorable to itself in all possible future contingencies. The desire to have a law has not been strong enough to overcome the determination of each nation to have the law suited to its own special circumstances; but when this war is over the desire to have some law in order to prevent so far as possible a recurrence of the same dreadful experience may sweep away all these reluctances and schemes for advantage and lead to agreement where agreement has never yet been possible. It often happens that small differences and petty controversies are swept away by a great disaster, deep feeling, and a sense of common danger. If this be so we can have an adequate law and a real court which will apply its principles to serious as well as petty controversies, and a real public opinion of the world responding to the duty of preserving the law inviolate. If there be such an opinion it will be enforced. I shall not now inquire into the specific means of enforcement, but the means can be found. It is only when opinion is uncertain and divided or when it is sluggish and indifferent and acts too late that it fails of effect. During all the desperate struggles and emergencies of the great war the conflicting nations from the beginning have been competing for the favorable judgment of the rest of the world with a solicitude which shows what a mighty power even now that opinion is.

Nor can we doubt that this will be a different world when peace comes. Universal mourning for the untimely dead, suffering and sacrifice, the triumph of patriotism over selfishness, the long dominance of deep and serious feeling, the purifying influences of self-devotion will surely have changed

the hearts of the nations, and much that is wise and noble and for the good of humanity may be possible that never was possible before.

Some of us believe that the hope of the world's progress lies in the spread and perfection of democratic self-government. It may be that out of the rack and welter of the great conflict may arise a general consciousness that it is the people who are to be considered, their rights and liberties to govern and be governed for themselves rather than rulers' ambitions and policies of aggrandizement. If that be so our hopes will be realized, for autocracy can protect itself by arbitrary power but the people can protect themselves only by the rule of law.

ELIHU ROOT.

New York, N. Y.

INSURANCE—DELIVERY OF POLICY.

WILLIAMS v. PHILADELPHIA LIFE INS. CO. et al.

Supreme Court of South Carolina. Aug. 10, 1916.

89 S. E. 675.

When the insurer mails its policy to its agent for delivery to the applicant without contemplation of further action, delivery is complete and liability attaches, though the agent wrongfully fails to deliver it.

GARY, C. J. This is an appeal from an order sustaining a demurrer to the complaint, on the ground that it does not state facts sufficient to constitute a cause of action—

"in that it does not allege any contract, between Philadelphia Life Insurance Company and plaintiff's intestate, and in that it does not allege the breach, by the defendants, of any duty owing by defendants, to plaintiff or plaintiff's intestate, or the neglect of any such duty."

The complaint contains allegations appropriate to two causes of action, one arising ex contractu, and the other ex delicto. If they are sufficient to constitute either cause of action, the complaint is not demurrable. Cartin v. Railway, 43 S. C. 221, 20 S. E. 979, 49 Am. St. Rep. 829.

In the case of Blakeley v. Bradley, 99 S. C. 229, 83 S. E. 184, the action was to recover of the defunct State Mutual Fire Insurance Company, against an alleged policy holder, for past-due assessments. The defendant denied that he was a policy holder, on the ground that he had never received the policy of insurance. The secretary and treasurer of the company testified that the policy was issued by them, and mailed to the defendant, addressed to his post-office. This court said: "If that be true, then the policies were issued, * * * and the defendant is bound."

If, at the time of mailing a policy, properly addressed to the applicant, it is the intention of the insurer that it is to be delivered to the applicant without further action on the part of the insurer, then the law regards the policy as issued and delivered, as soon as it is placed in the post-office for that purpose. The mailing of the policy, under such circumstances, manifests an intention on the part of the insurer to complete the negotiations for insurance; and such will be the effect unless the applicant gives notice of some good reason, for refusing to accept the policy.

Is there any difference in principle, when the insurer mails the policy to a third party, or even to an agent, with the sole object, in using such a medium of communication, to effect the unconditional delivery of the policy to the applicant? If the insurer in such a case, does not contemplate any further action than the delivery of the policy by the agent, then the delivery becomes effectual as soon as the policy is mailed; and no unauthorized act on the part of the agent in disobeying the instructions of the principal will be allowed to defeat the vested rights of the applicant and the intention of the insurer, when he placed the policy in the post-office. It is even doubtful, whether the insurer himself could prevent the delivery of the policy to the applicant, after mailing it under such circumstances. The test is whether the policy is mailed to the agent without any other intention than its unconditional delivery to the applicant. It would be inequitable and unjust, and would be prejudicial to the conduct of the business interests of the country, if the doctrine was recognized that an agent, by an unauthorized act, and in disobedience of his instructions, should be allowed to defeat, not only the intention of his principal, but likewise the rights of those dealing with him. A contrary doctrine would, at least, be against the spirit of the maxim that equity considers that as done which should have been done.

It is also a well-recognized doctrine that a principal is liable for the wrongful acts of his agent while acting within the apparent scope of his authority, even when committed against the

instruction of the principal; and it unquestionably would be in violation of the spirit of this rule if a principal should be allowed to reap a benefit from the wrongful and unauthorized act of an agent, especially when such wrongful act would be prejudicial to the rights of an interested third party, dealing with the principal.

The words, "having made arrangements with the defendants for the payment of the premium therefor satisfactory to them," in the fourth paragraph do not, it is true, show the terms of the agreement between the parties in regard to the payment of the premium, but they were evidently intended to convey the idea that the nonpayment of the premium was not to interfere with the delivery of the policy in case the application was approved by the insurer.

The allegations of the fifth paragraph, are as follows:

"The plaintiff is informed and believes that some time in January, 1911, the defendant issued a contract of insurance on the life of the said Margaret E. Williams for the sum of $10,000, payable at her death to her estate, and forwarded the same to its said agent, for delivery to the said Margaret E. Williams."

The allegations which we have quoted show that the policy was mailed by the defendant to its agents, for delivery; and as there are no allegations that they were authorized to do any other act, in regard to the policy, it must be presumed that such delivery was intended to be unconditional. It was therefore a wrongful and unauthorized act on their part in failing or refusing to deliver the policy. We have already shown that a policy is constructively delivered as soon as it is mailed, under the circumstances alleged in the complaint.

The respondent gave notice that it would ask that the order of the circuit court be sustained upon the additional grounds that the plaintiff's right of action, if any, did not survive, and that the damages alleged are uncertain, remote and speculative. Having reached the conclusion that the complaint states facts, sufficient to constitute a cause of action, based on contract, the questions presented by the additional grounds become merely speculative.

Judgment reversed.

HYDRICK, FRASER, WATTS, and GAGE, JJ., concur.

NOTE.—*Issuance of Policy and Delivery to Agent of Company as Delivery to Insured.*—The rule laid down in the instant case that delivery to a third party, even the agent of the insurer to effect an unconditional delivery to insured is equivalent to a delivery to insured appears not to be accepted in its logical entirety. Thus in Smith v. Commonwealth Life Ins. Co., 157 Ky. 148, 162 S. W. 779, there was a policy dated Oct. 16, 1911, and the company's agent sought to deliver it that day but was unable to find insured. He took it to his sister the following morning but refused to deliver it to her, though she told him she had the money to pay the first premium. Insured was drowned on the night of October 16, but neither the agent nor the sister knew of such drowning until afterwards. The agent took the policy to the sister on Monday morning and she asked him if the premium was paid and he said: "Well, yes, I suppose the premium was paid," and it was a rule of the company to take the first premium out of the agent's salary. Theretofore he had collected premiums at the house where the sister lived. The court held there could be no recovery, because "by the express terms of the policy the company incurred no obligation unless the policy was delivered while the insured was alive. Defendant's local agent was not the agent or broker of the insured. The delivery of the policy to him was not a delivery to the insured." The principle in the instant case reasonably construed made a delivery on Monday, while the insured was in good health and the agent admitted as he had a right to do that the premium had been paid, because he had the right to settle with the company on that basis. The occurrence the morning after has no relevancy to the question involved. This ruling was approved in Snedeker v. Metropolitan L. Ins. Co., 160 Ky. 119, 169 S. W. 570, in which case the policy was received by company's agent on Oct. 22, 1910, and held by the agent without delivery. Insured was run over by a train on Oct. 30. It was claimed that delivery to the agent was delivery in effect to insured. The court said: "Whatever be the rule in other jurisdictions, such a rule does not prevail here." It was also said: "Nor can we say that the retention of the policy by defendant's agent for about a week was so unreasonable as to give effect to the policy, notwithstanding its conditions." Certainly if the agent exercises a discretion in failing to make a delivery, his failure is good for an unlimited as well as a limited time, and nothing should have been said about "about a week" being a not unreasonable time in retention.

In Amarillo N. L. Ins. Co. v. Brown, Tex. Civ. App., 166 S. W. 658, it was said: "Neither are we able to agree with appellant, that Nelson, being an agent of the company was unable to become the custodian of the insured as to the particular policy." The facts show that the agent by direction of another agent who had authority in the premises, telephoned insured that he had in his possession a policy at a higher rate than that insured had asked for. Insured said that was all right and he would be down in a couple of weeks and get it and pay the increased premium. Insured died within four days of this conversation. Judgment in insured's favor was affirmed.

In Neff v. Metropolitan L. Ins. Co., 39 Ind. App. 250, 73 N. E. 1041, it was said that delivery of a policy to an agent unconditionally to be delivered to assured amounted to a delivery to assured, but if premium was to be paid or assured was not in good health, delivery to agent was not delivery to assured. To the same effect, if assured is ill at the time the agent receives the policy. Kilcullen v. Metropolitan L. Ins. Co., 108 Mo. App. 61, 82 S. W. 966. It would have

been a fraud on the part of the agent to have delivered the policy to the assured under these circumstances.

In Ky. M. L. Ins. Co. v. Jenks, 5 Ind. 96, it was held that there having been a substantial compliance with condition of policy that first year's premium should be paid, delivery to the agent unconditionally amounted to delivery to assured. To the same effect is Drago v. Prudential Ins. Co., 184 Ill. App. 618.

In Bowen v. Prudential Ins. Co., Mich., 144 N. W. 543, assured on application paid the premium for a year. Policy was issued on January 24, 1911, and received by local agent on the morning of the 28th and instructions were given to deliver it if assured was in good health. He was killed on the afternoon of that day. Judgment for plaintiff was reversed without new trial. The court discusses the rule laid down in Life Ins. Co. v. Babcock, 104 Ga. 67, 30 S. E. 273, 42 L. R. A. 88, 69 Am. St. Rep. 134, which held that in a case, where the assured paid the first year premium on application and in the receipt which provided that there was no responsibility unless at the time of delivery of policy insured was in good health, yet where the policy was received on Nov. 30, and assured was killed the next day, the insurance was in force. But Michigan Supreme Court yet agreed there was a strong, sound, underlying principle for the Georgia ruling, in that "defendants could not escape liability by relying on their own wrongs and are estopped by their misconduct and negligence, or that of their local agents, through whom the application was made, from denying a delivery which they should have made."

But it was said the facts in the Bowen case are distinguishable because there were no statutory provisions such as gave support to the Babcock ruling. It was said: "There is nothing in this case to indicate that Bowen was in any way deceived or misled or that he understood he would be insured until his policy was delivered to him while in good health as agreed in his contract." This observation leads to the belief that the Michigan court was begging the question really involved. The opinion referred to some cases supporting the proposition that delivery to the agent of the company was not delivery to asured. C.

ITEMS OF PROFESSIONAL INTEREST.

MR. LASHLY CRITICISES THE DECISION IN CAREY v. DONOHOE.

Mr. Jacob Lashly, an attorney of St. Louis, who has specialized largely in bankruptcy cases, in addressing a body of credit men recently, undertook to explain for them some of the hard problems of the administration of the Bankruptcy Act. In the course of his address he had occasion to refer to the recent decision of the United States Supreme Court, decided March 13, 1916, in the case of Carey v. Donohoe, 36 Sup. Ct. 386. He said:

"The latest expression of the Supreme Court of the United States in construing the meaning of the last clause of § 60, subd. A, as applied to real estate transfers, is the opinion of Mr. Justice Hughes in the case of Carey v. Donohoe, Trustee. Prior to this decision it was the law established by a majority of the decisions in districts having recorded statutes similar to the statute of Missouri which requires transfers of real estate to be recorded as against subsequent bona fide purchasers, that this was a 'required' statute within the meaning of the Bankruptcy Act, and that where a preference was created by the conveyance or encumbrance of real estate, the four months' limitation in § 60 of the Bankruptcy Act did not begin to run until the date of recording of the deed or mortgage. However, the Supreme Court has, in the case above mentioned, decided that it shall be otherwise, and hereafter it will be necessary for the trustee, in seeking to recover a preference created by a real estate transfer or mortgage in Missouri to show that the instrument was actually executed and delivered within four months prior to the institution of the bankruptcy proceedings, irrespective of the date of its recording. Manifestly, this will be hard to do, for the experience of the past justifies us in the assumption that questionable and vulnerable deeds, and deeds of trust given for purposes of preference, with the view of bankruptcy, are usually withheld from record for purposes of secrecy, and the burden placed upon the general creditors to seek out the facts of a secret transfer and bring the debtor to the bar of justice before the lapse of four months, is indeed a heavy burden. It would seem to me that the general application of this doctrine would but encourage secret transfers of real estate and multiply fraud; but such is the law as announced by the greatest court in the world, and we have but to bow to its mandate and hope that at some future time the Bankruptcy Act may be amended to meet this contingency.

"The statute under construction in the case I have alluded to is the Ohio recording law, which requires deeds and instruments of writing for the conveyance or encumbrance of real estate to be recorded, and makes such instruments until so recorded or filed for record, fraudulent as to subsequent bona fide purchasers having at the time of such subsequent purchase no knowledge of the existence of any

former deed. This is in effect the Missouri statute also. The Supreme Court determined that inasmuch as the instruments 'required' to be recorded under this law were imited in consideration to subsequent purchasers, and did not extend to creditors in general, the law did not come within the meaning and intent of the Act of Congress, which in using the word 'required' in § 60 of the Act of Bankruptcy, had reference to that class of creditors represented by trustees in bankruptcy; namely, general creditors.

"I do not assert that this is a new construction of this portion of the Bankruptcy Law, but merely that it is one which had not generally obtained, and which bankruptcy lawyers throughout the country were reluctant to adopt, in view of its nullifying effect upon the Bankruptcy Law with reference to secret real estate transfers. Indeed, the Supreme Court of Missouri had previously construed the Missouri recording statute along these same lines, drawing the same distinction between the real estate statute and that applicable to transfers of real property which has been drawn in the Carey case, as will be seen by reference to the case of Pew v. Price, recorded in 251 Mo., at page 614. The language of Judge Bond, who wrote the opinion in that case, was prophetic of the language and principles enunciated by Mr. Justice Hughes in the Carey case nearly three years later.

"The recording statute of Missouri with reference to transfers of personal property is broader and makes unrecorded chattel mortgages void as to creditors, and therefore is still within the provisions of the Bankruptcy Law as construed by these supreme courts. It may still be stated, therefore, that a chattel mortgage which conveys a lien upon personal property to a creditor under circumstances amounting to a preference in favor of such creditor, may be voided at the instance of the trustee in bankruptcy if such instrument is not recorded prior to four months before the initiation of the bankruptcy proceeding. This much, at least, is left to us, and as a matter of practice the question arises with respect to personal property transfers much more often than it does with respect to transfers of real estate."

BAR ASSOCIATION MEETINGS FOR 1916—WHEN AND WHERE TO BE HELD.

Massachusetts—Pittsfield, October 13 and 14.
Nebraska—Omaha, December 29 and 30.
Oregon—Portland, November 21.
Vermont—Montpelier, October 3 and 4.

HUMOR OF THE LAW.

RUBAIYAT.

News Item—A recent decision has been handed down by a Boston judge, to the effect that husbands are responsible for the disorderly acts of their wives. Hence the following:

A Boston judge has handed down
A rule so wondrous wise,
That wedded man must mind his q's—
And likewise, mind his eyes.

His wife may punch him in the jaw;
May make him hop and yell—
She's acting quite within the law—
'Tis he's responsible.

—J. H. Rockwell.

An Atchison business man called a new salesman into his office and said unto him, "When a plumber makes a mistake he charges twice for it. When a lawyer makes a mistake, it's just what he wanted, because he has a chance to try the case all over again. When a doctor makes a mistake he buries it. When a preacher makes a mistake nobody knows the difference. But you're going to try to be a salesman, and when a salesman makes a mistake it means a bereavement for the house."—*Kansas City Star.*

One of the justices of the United States Supreme Court is a gentleman of great height and correspondingly large proportions. Traveling to Washington in a sleeper one night, he became thirsty after retiring. He arose and sought the smoking-room for a drink of water. His majestic build and overpowering personality made him an awesome figure as he broke in upon a party of traveling men who were sitting up late to tell smoking-room stories. They shrank back rather guiltily because the justice in his white robe seemed a walking rebuke to low minds. They had been drinking, too—passing the water glass along with a flask of whiskey. The stern-faced intruder detected the odor when he drew a glass of water for himself and asked thunderously: "Who has had the temerity to drink whiskey out of this glass?" The company exchanged glances helplessly and no one could muster up the nerve to speak. The justice repeated the question and one drummer with a faint show of courage answered: "I did." The justice summoned another inch in height and drawing on the resources of his voice exclaimed: "And where in Sam Hill are you hiding the bottle?" —*Snappy Stuff.*

WEEKLY DIGEST

Weekly Digest of ALL the Important Opinions of ALL the State and Territorial Courts of Last Resort and of ALL the Federal Courts.

Copy of Opinion in any case referred to in this digest may be procured by sending 25 cents to us or to the West Pub. Co. St. Paul, Minn.

1. **Adoption**—Statute.—Legislature has power to declare legal status of adopted child and make him capable of inheriting from adopting parent.—Cooley v. Powers, Ind., 113 N. E. 382.

2. **Arson**—Indictment and Information.—Information charging burning of insured property with intent to defraud insurer, held not void for uncertainty as not stating facts, constituting intended fraud, or particular circumstances connecting defendant with that element of offense.—People v. Truax, Cal., 158 Pac. 510.

3. **Assignments for Benefit of Creditors**—Directory Requirement.—Although the assignee for the benefit of creditors fails to record the assignment as required by statute, or give bond, the assignment is nevertheless valid, and he has title to the property; the requirements being directory only.—In re Berman, N. Y., 160 N. Y. Supp. 79.

4. **Attorney and Client**—Settlement by Client. —Where a client in good faith and without intent to defraud his attorney settles the litigation, the attorney can recover only the reasonable value of services rendered by him to time of settlement.—Southworth v. Rosendahl, Minn., 158 N. W. 717.

5.——Suspension. — Attorney, who converts funds of client by transferring check to his own creditor, another client, with direction to apply the proceeds on a debt for moneys collected, and who unduly delays settlement with first client, there being extenuating circumstances, will be suspended for one year.—In re Eisenberg, N. Y., 160 N. Y. Supp. 143.

6.——Suspension.—Act of an attorney, in indorsing in disguised handwriting the signature of his client upon a check payable to such client's order, for the purpose of securing his disputed claim for 50 per cent of amount as his attorney fee, held to warrant suspension of such attorney.—In re Smith, N. Y., 160 N. Y. Supp. 88.

7.——Suspension.—An attorney's obligation to his clients requires him to keep their money entirely separate from his own, and any appropriation of such money to other purposes is misconduct warranting suspension. — In re Dobbs, N. Y., 160 N. Y. Supp. 173.

8. **Bankruptcy** — Building Association. — Shareholders in a building association, entitled at any time to withdraw and demand payment of the book value of their stock, are, upon the bankruptcy of the association, creditors entitled to vote for trustee.—Merchants' National Bank of San Francisco v. Continental Building & Loan Ass'n, U. S. C. C. A., 232 Fed. 828.

9.——Commissions.—Where a trustee in bankruptcy sold property free from liens, and the lienholders who bought it in paid only part of the price in cash, the remainder being credited upon the amount of their liens, the trustee is entitled to commissions computed on the sale price, and not the price paid in cash.—In re West, U. S. D. C., 232 Fed. 903.

10.——Costs.—When a trustee contests the claim of an outsider, the controversy is inter partes, and costs follow as in any other case.—In re All Star Feature Corp., U. S. D. C., 232 Fed. 1004.

11.——Costs.—Where a bankrupt's property is sold free from liens with the consent of the lienholders, necessary costs of sale, including commissions of the referee and trustee, may be allowed regardless of whether there is a surplus above the amount of the lien.—In re West, U. S. D. C., 232 Fed. 903.

12.——Creditors.—Under Bankr. Act, §§ 56b, 57e, a secured creditor cannot, after selection of a trustee, participate in creditors' meetings, except in so far as the security does not cover his entire claim.—Merchants' National Bank of San Francisco v. Continental Building & Loan Ass'n, U. S. C. C. A., 232 Fed. 828.

13.——Harmless Error.—That petitioner was denied the right to vote for trustee is harmless error, where petitioner's claim was so small that had the right not been denied, the selection of the trustee could not have been affected.—Merchants' National Bank of San Francisco v. Continental Building & Loan Ass'n, U. S. C. C. A., 232 Fed. 828.

14.——Jurisdiction.—Though the members of a firm who were adjudicated bankrupts resided in another district, the court of the district wherein their principal business was carried on has jurisdiction to adjudicate them bankrupts. —In re Gurler & Co., U. S. D. C., 232 Fed. 1016.

15.——Trustee.—In view of the duties which might fall on the trustee under the Bankruptcy Act, and the General Orders, held, that a trust company, which was trustee of mortgages belonging to the bankrupt, etc., should not be appointed trustee.—Wilson v. Continental Building & Loan Ass'n, U. S. C. C. A., 232 Fed. 824.

16.——Waiver.—Under Bankruptcy Act, § 2, the limitation of jurisdiction to persons residing or having their business in the district, affects the subject-matter, and under Judicial Code,

§ 37, is not waived by the appearance of the bankrupt.—Finn v. Carolina Portland Cement Co., U. S. C. C. A., 232 Fed. 815.

17. **Banks and Banking**—Joint Tenants.—Under Banking Law, § 148, a bank deposit payable to the depositor and another, or either, and the survivor of them, becomes their property as joint tenants, and, upon the depositor's death, title vests in the survivor.—In re Delmore's Estate, N. Y., 160 N. Y. Supp. 62.

18.——Lien.—Under Comp. Laws Mich. 1897, § 6098, the lien of a bank on stock held superior to that of a pledgor, where no demand for its transfer was made by the pledgor until after the maturity of a debt from the pledgor to the bank.—National City Bank of Chicago v. Kalamazoo City Sav. Bank, U. S. C. C. A., 232 Fed. 669.

19. **Bills and Notes**—Certificate of Deposit.—A negotiable certificate of deposit, assigned after maturity, is taken subject to defenses available against the payee.—State ex rel. Hadley v. Greenville Bank, Mo., 187 S. W. 597.

20.——Evidence.—Maker of note for amounts advanced by plaintiff under an agreement that after maker had raised money for a mining company, and after it had purchased maker's property maker would reimburse plaintiff, was not liable where plaintiff failed to pay it over to the maker.—Keller v. Yzabal, Mo., 187 S. W. 576.

21.——Illegality.—If a lease is by reason of unlawful object void ab initio, rent notes given in consideration thereof are void even in the hands of an indorsee for value.—Mitchell v. Campbell, Miss., 72 So. 231.

22. **Brokers**—Fraud.—Where landowner had intimated that if he could not secure price named he would be willing to consider less, broker's remark to prospective purchaser that if purchaser would let the broker work it out for him he might be able to buy it for less was not fraudulent conduct as a matter of law toward the landowner.—Hight v. Marshall, Ark., 187 S. W. 433.

23.——Prospectus.—Where brokers rendered services in effecting an exchange of land which were accepted, the owner is liable for compensation though brokers received a prospectus from the owner reciting that none would be paid without a contract.—McCartney v. Clover Valley Land & Stock Co., U. S. C. C. A., 232 Fed. 697.

24. **Carriers of Goods**—Connecting Carrier.—Where defendant railroad undertook to transport a car of sewer tile to plaintiff at a point beyond its own line, and the car was delayed in transit, defendant constituted connecting carrier its agent, so that notice to connecting carrier of the use intended to be made of the tile was notice to defendant.—Erie R. Co. v. Hipskind, Ind., 113 N. E. 304.

25.——International Law.—That one charged with carrying explosives on an interstate passenger train, in violation of Criminal Code, § 235, was a foreign army officer, and intended to use the explosives in an alleged act of war in enemy territory, held no defense.—Harn v. Mitchell, U. S. C. C. A., 232 Fed. 819.

26.——Tariff.—Under Interstate Commerce Act, § 6, a shipper is liable for the rate fixed by the tariff filed, regardless of mistake of carrier's servant, or that shipper made prices in reliance on rate quoted to him.—Alabama Great Southern R. Co. v. George M. McFadden & Bros., U. S. D. C., 232 Fed. 1000.

27. **Carriers of Passengers** — Accelerating Speed.—If the operatives of a street car had neither knowledge that a passenger had arisen, nor reason to suppose she would arise, from her seat to leave the car, it was not negligence to accelerate the speed of the car with such a jerk as would not injure a passenger who was seated, although sufficiently violent to throw one down if standing.—Modrell v. Dunham, Mo., 187 S. W. 561.

28.——Discrimination. — Where a railroad posts two legal schedules of fares, one through and one local, the passenger may elect which he will take, and one passenger takes a through ticket, and another pays local rates between the same points, there is no discrimination.—Brown v. Terre Haute, I. & E. Traction Co., Ind., 113 N. E. 313.

29. **Charities**—Trustees.—In absence of any provision therefor in deed of trust, and where the trustees had the management and control of property in trust for a religious society, the court's appointment of a board of trustees did not extinguish the charity.—Crawford v. Nies, Mass., 113 N. E. 408.

30. **Commerce**—Prize Fight Films.—Act July 31, 1912, § 1, forbidding the introduction into the United States of films showing prize fights or their transportation from state to state, is a valid exercise of congressional power to regulate interstate commerce.—United States v. Johnston, U. S. D. C., 232 Fed. 970.

31. **Constitutional Law**—Contempt.—Act July 12, 1842 (P. L. 339), abolishing imprisonment for debt, excepting proceedings for contempt, does not affect powers of court of equity to enforce decrees by attachment.—Commonwealth v. Lewis, Pa., 98 Atl. 31:

32.——Estoppel.—Where the state had contracted to build an armory in the city subject to certain conditions with which the city had complied, including conveyance of a site to the state, held, that the state was estopped to question the constitutionality of the law authorizing the city to make such conveyance.—State v. Turner, Ohio, 113 N. E. 327.

33.——Impairment of Contract.—Any contract by railroad being subject to future exercise by state of police power, obligations of such contracts are not impaired by such future legislation.—Erie R. Co. v. Board of Public Utility Com'rs, N. J., 98 Atl. 13.

34.——Involuntary Servitude.—Mere imprisonment is not involuntary servitude, but imprisonment at hard labor is involuntary servitude.—Flannagan v. Jepson, Iowa, 158 N. W. 641.

35.——Peaceable Assemblage.—Where there was no disturbance or any reason to anticipate a disturbance in camps upon property of coal companies, the denial of the right of peaceable assemblage for the purpose of influencing the election in precincts coincident with such camps was an inexcusable and corrupt violation of the natural and inalienable rights of citizens.—Neelley v. Farr, Colo., 158 Pac. 458.

36. **Contempt**—Habeas Corpus.—Where defendant in equity was imprisoned for contempt in refusing to obey decree requiring removal of obstruction from road, fact that decree might have been enforced through writs of assistance and sequestration does not entitle him to release by habeas corpus.—Commonwealth v. Lewis, Pa., 98 Atl. 31.

37. **Copyrights**—Royalties.—Where an author transferred his rights in return for 20 per cent of gross receipts derived from their use, he could recover only 20 per cent of the amount actually received by the transferee; and if the purchaser later let the work to a booking agency, he need account only for the amount received from, and not by, the agency.—Arden v. Lubin, N. Y., 160 N. Y. Supp. 109.

38. **Corporations**—Acceptance of Benefits.—Authority of vice-president of corporation to execute mortgage is sufficiently proven by duly authorized supplemental agreement, showing voluntary execution of contract by corporation, its acceptance of benefits, and recognition of mortgage as binding.—J. B. Levert Co. v. John T. Moore Planting Co., La., 72 So. 249.

39.——Foreign Corporations.—A foreign railroad corporation was "engaged in or soliciting business" in Massachusetts so as to be amenable to process under St. 1913, c. 257, amending St. 1907, c. 332, § 1, where it contracted with a resident to represent it as New England passenger agent and invested him with considerable authority, both actual and apparent.—Reynolds v. Missouri, K. & T. Ry. Co., Mass., 113 N. E. 413.

40.——Reorganization.—An instrument appointing a bondholders' committee and authorizing it to purchase the company, reorganize and turn over the plant and property to a new corporation, and providing the financial details of the transaction, does not authorize purchase of another company which produces nothing and incurring interest charges thereon.—Carter v. First Nat. Bank of Pocahontas, Md., 98 Atl. 77.

41.——Subscription.—A person who has paid for shares in a company which never was organized may recover it back unless he consented to the application, if his payment made by those

into whose hands it came or failure to organize was due to his own acts.—Minor v. Gordon, Ky., 186 S. W. 480.

42. **Counties**—Elections.—Where, prior to a county seat election, the election commissioners appointed judges who did not possess requisite qualifications and were all partisans of a particular location, such conduct of the commissioners did not invalidate the election.—Webb v. Bowden, Ark., 187 S. W. 461.

43. **Courts**—Jurisdiction.—The jurisdiction of the federal court arising from diversity of the citizenship of the parties cannot be impaired or annulled by state statutes.—Memphis St. Ry. Co. v. Bobo, U. S. C. C. A., 232 Fed. 708.

44. **Damages**—Evidence.—Evidence that deceased workman after his injury said that he drank 12 whiskies and 12 beers and used one or two boxes of cigarettes daily is admissible on issue of damages as tending to show that his inability to labor was not due entirely to his injuries.—Botana v. Joseph F. Paul Co., Mass., 113 N. E. 358.

45. **Death**—Instruction.—Under Federal Employers' Liability Act, § 9, as amended by Act April 5, 1910, § 2, instruction that plaintiff cannot recover for suffering endured by deceased employe nor for expense, for which he could have sued had he lived, is erroneous.—Brooks v. Yazoo & M. V. R. Co., Miss., 72 So. 227.

46. **Dedication**—Estoppel.—The right of the owner of a plat to withdraw his tender to a municipality of portions for streets or other public use being dependent upon facts and circumstances, he may be precluded from a withdrawal by selling lots with reference to the plat, or by acceptance by the city and improvements made.—Town of Kenwood Park v. Leonard, Iowa, 158 N. W. 655.

47. **Deeds**—Reservation.—A "reservation" is never a part of the estate itself, but is something taken back out of that already granted, as rent, the right to cut timber or to do something in relation to the estate.—Presbyterian Church of Osceola, Clarke County v. Harken, Iowa, 158 N. W. 692.

48. **Divorce**—Custody of Child.—If the established facts justify the conclusions that the mother of the child is capable of giving proper care to the child, and that she will comply with the orders of the court, it would not be beyond the power of the court to permit her to take the child to her home in another state.—Weatherton v. Taylor, Ark., 187 S. W. 450.

49.——Jurisdiction.—Where wife connived at husband's procurement of divorce in jurisdiction other than Massachusetts, which divorce is not declared void in Massachusetts, and subsequently invoked voluntarily jurisdiction of courts of another state, so that two decrees were entered, in effect declaring the divorce valid, such wife, in proceedings for allowance as widow, cannot question jurisdiction of foreign court to enter judgment of divorce barring rights as spouse.—Chapman v. Chapman, Mass., 113 N. E. 359.

50. **Easements**—Enlargement.—A reservation of an easement or right of way could not be enlarged by a subsequent grantee of the property for whose benefit it was reserved, since the use of the property is limited to the stated purpose of the reservation. — Presbyterian Church of Osceola, Clarke County v. Harken, Iowa, 158 N. W. 692.

51.——Estoppel.—Where a deed conveying one of two adjoining lots did not clearly include a driveway between them, the grantee, who knew such driveway existed, is precluded from claiming any greater rights therein than her grantor, who testified to advising her of defendants' right to use it.—Benedict v. Myers, N. Y., 159 N. Y. Supp. 1018.

52. **Elections**—Voting Precincts.—Conduct of coal mining companies during an election in establishing voting precincts on their private property coincident with fence or guard lines of their camps held not defensible on the ground of industrial necessity.—Neelley v. Farr, Colo., 158 Pac. 458.

53. **Eminent Domain**—Attorney Fees.—Where attorneys for defendant, in railroad's condemnation proceedings, had prepared the case, services being worth $500, the judgment for defendant for $600, in action to recover on dismissal his expenses, under Code 1906, § 1877, held not excessive.—Merichin & M. Ry. Co. v. Betfeze, Miss., 72 So. 233.

54.——Due Process of Law.—Uncompensated obedience to a regulation, enacted for the public safety under a proper exercise of the police power, does not constitute a taking of property without due compensation.—City of Indianapolis v. Indianapolis Water Co., Ind., 113 N. E. 369.

55.——Public Use.—Fielder Act, relating to grade crossings, enacted for public safety under police power, is not a taking of private property for public use without just compensation.—Erie R. Co. v. Board of Public Utility Com'rs, N. J., 98 Atl. 13.

56. **Equity**—Administrator. — That one appointed administrator on the day of decedent's death was a debtor to the estate and judge of the superior court having power to redress wrongs against the estate enhanced the need for interference by a court of equity to protect the property rights of citizens of another state.—Jennings v. Smith, U. S. D. C., 232 Fed. 921.

57.——Amendment of Pleadings. — However slight the amendment of a bill may be, and regardless of the fact that no new matter is set up and the prayer only is changed, plaintiff cannot have considered, in aid thereof, answers to the original bill, which are out of the case unless adopted as answers to the amended bill.—Carter v. First Nat. Bank of Pocahontas, Md., 98 Atl. 77.

58. **Estoppel**—Ratification.—While one is not required to repay an advancement because advised that it has been made and expended, notice thereof may be one item in the proof of ratification.—Sawyer v. Iowa Constitutional Prohibitory Amendment Ass'n, Iowa, 158 N. W. 679.

59. **Executors and Administrators**—Claims.—Where an administrator has a claim against an estate which he represents, it must be presented to the commissioners and allowed by them as other claims.—In re Hayes' Estate, Vt., 98 Atl. 45.

60. **Execution**—Levy.—A judgment creditor who levies execution can only acquire the interest of the judgment debtor, and, where the judgment debtor merely held the bare legal title to land, that is all that the creditor can acquire.—George L. Cramer & Sons v. Roderick, Md., 98 Atl. 42.

61. **False Imprisonment**—Damages. — Award of $4,250 for arrest of plaintiff and imprisonment from December 19th to January 9th, where jail surroundings were vile, and plaintiff was physically neglected, and arrest was matter of newspaper notoriety, was not excessive.—Ehrhardt v. Wells Fargo Co., Minn., 158 N. W. 721.

62. **Fish**—Fishery Rights.—A right of fishing on a shore does not include the right to erect huts on the shore for fishermen.—Spring v. Conklin, N. Y., 159 N. Y. Supp. 1027.

63. **Fraud**—Misrepresentation.—If misrepresentation is accompanied by fraudulent intent to deceive, it may support action for fraud, although action for breach of warranty would lie.—Martin v. Shoub, Ind., 113 N. E. 384.

64. **Highways**—Proximate Cause. — Defendant's failure to sound his automobile horn did not proximately cause the collision, where plaintiff knew of his approach when 600 feet distant and turned out of the road in ample time.—Priebe v. Crandall, Mo., 187 S. W. 605.

65. **Insurance**—Change in Interest.—The giving of a mere option, not exercised, on insured property does not breach a policy provision against "change in interest or title."—Terminal Ice & Power Co. v. American Fire Ins. Co., Mo., 187 S. W. 564.

66.——Change of Possession.—A tenant's going into possession of premises insured by his landlord does not breach a policy provision against "change of possession."—Terminal Ice & Power Co. v. American Fire Ins. Co., Mo., 187 S. W. 564.

67.——Liability.—Where a policy insuring rent provided for payment of loss not exceeding one-twelfth of the amount insured for any one month and a fire loss was adjusted and paid at an amount equal to one-half the policy, and where a second fire resulted in further loss, held that the policy was in force at time of second

fire at one-half the amount thereof, and that the monthly payments on the second loss were limited to one-twelfth of that amount, not one-twelfth of the original insurance.—Van Nest v. Citizens' Ins. Co., Minn., 158 N. W. 725.

68. **Intoxicating Liquors**—Unlawful Transportation.—The offense of unlawfully transporting prohibited liquors is comprehended within the statutory affidavit charging selling, keeping for sale, or otherwise disposing of liquor contrary to law, under Acts 1915, p. 30, § 29½.—Burt v. State, Ala., 72 So. 266.

69. **Landlord and Tenant**—Eviction.—Where defendant rented office space under a year's lease and installed its agent, and, on discharging him, he refused to vacate the office, it was not the landlord's duty to eject him, but defendant was liable for the rent for the term in the absence of eviction by the landlord.—Julian v. Kansas City Granite & Monument Co., Mo., 187 S. W. 584.

70.——Option.—A clause in a lease providing for surrender of possession by the tenant within 30 days, in case of a sale of the property, held to be merely an option in favor of the lessor which could be waived by him.—Christy v. Namur, Iowa, 158 N. W. 669.

71.——Public Policy.—If a landlord knowingly leases his property for purposes of prostitution, he cannot recover any rent; the contract being against public policy and void.—Mitchell v. Campbell, Miss., 72 So. 231.

72. **Larceny**—Description of Property. — A conviction of larceny of a "heifer" worth $16 held a conviction of larceny of a "cow," within Act No. 64 of 1910, § 1, denouncing the theft of a cow as a felony.—State v. Papillon, La., 72 So. 249.

73.——Possession.—Where, in a prosecution for grand larceny, the alleged owner had never been in possession of the goods, an affirmative charge was required.—Wade v. State, Ala., 72 So. 269.

74.——Variance.—Where indictment charged taking of property of trust company, and proof established misappropriation after death of the owner, the trust company being executor, there was no variance.—People v. Smith, N. Y., 159 N. Y. Supp. 1073.

75. **Libel and Slander**—Libel per se.—Letter of lumber company to third party stating conditionally that plaintiff had misapplied money advanced to him to pay for hauling staves held not libelous per se as to plaintiff.—Lucas E. Moore Stave Co. v. Wells, Miss., 72 So. 228.

76.——Slander. — Spoken words, charging scientific man engaged in research work with bad manners and being a trouble maker in the laboratory in which he worked are not libelous per se.—Kober v. Lyle, N. Y., 160 N. Y. Supp. 99.

77. **Literary Property**—Royalties.—A contract to write a vaudeville sketch acknowledged payment of a sum to be deducted from royalties to be paid for 7 weeks, whereupon the sketch was to become the purchaser's sole property. Held not to require payment of the royalties unless the sketch was produced.—Kennedy v. Rolfe, N. Y., 16 N. Y. Supp. 93.

78. **Mandamus**—Certiorari.—Legality of act of civil service commission refusing to certify relator's names on payroll is not presented by certiorari, but mandamus is the proper remedy.—Brokaw v. Burk, N. J., 98 Atl. 11.

79.——Taxation.—Mandamus will issue to compel a school board to levy taxes or otherwise raise sufficient money to pay a judgment against it.—Gowdy v. Board of Education of City of Paterson, N. J., 98 Atl. 12.

80. **Mortgages**—Assumption of Debt.—A purchaser of mortgaged land, who assumes the mortgage becomes the principal debtor, and the vendor a surety only, and the mortgagee must so treat them after notice of the arrangement.—Hildrith v. Walker, Mo., 187 S. W. 608.

81. **Master and Servant**—Contributory Negligence.—Where the master ordered the servant to drive from the top of a load of shingles, and the servant voluntarily stood on the load, when he was free to sit or stand, his injury, resulting from his standing position, is referable to his own act.—Gilbert v. Hilliard, Mo., 187 S. W. 594.

82.——Course of Employment.—Accident held to arise out of plaintiff's employment as a bartender, where he was struck in the eye by a drinking glass thrown by a drunken patron.—State v. District Court of Koochiching County, Minn., 158 N. W. 713.

83.——Course of Employment.—Where an ailing employe of company, installing machinery for another company, was told by employe of the other company to take some salts, and was informed where some of these were stored in the factory, and, going to the place indicated, by mistake took some other chemical, causing his death, the accident did not "arise out of his employment," under Workmen's Compensation Act.—O'Neil v. Carley Heater Co., N. Y., 113 N. E. 406, 218 N. Y. 414.

84.——Employers' Liability Act.—Where a mechanic was called in to fix an automobile for a few hours, he did not become a servant, under Employers' Liability Act.—Flower v. Buck, N. Y., 159 N. Y. Supp. 1042.

85.——False Imprisonment.—In false imprisonment action against railroad and employe, a count, alleging that "defendant's" servant, acting within his authority, wrongfully arrested and imprisoned plaintiff, is insufficient.—Central of Georgia Ry. Co. v. Carlock, Ala., 72 So. 261.

86.——Hazardous Employment.—A traveling salesman, riding in a public bus while engaged in his regular occupation, was not engaged in hazardous employment, and cannot recover under the Workmen's Compensation Law, although his employer's business was hazardous under section 2, group 32, of the act.—Mandle v. A. Steinhardt & Bro., N. Y., 16 N. Y. Supp. 2.

87.——Medical Attention.—Where the employer collected fees for medical attention for the employes and families and turned them over, without profit, to a competent physician, who attended an employe's child once and failed to call again, of which no complaint was made to the employer, the negligence was his, and the employer was not liable.—Eastman, Gardiner & Co. v. Permenter, Miss., 72 So. 234.

88.——Relief Department.—Under section 5 of the federal Employers' Liability Act, regulation of relief department of railroad that, if employe brings suit for injuries, benefits accruing under membership in relief department shall be forfeited is invalid.—Wise v. Chicago, B. & Q. R. Co. Relief Department, Minn., 158 N. W. 711.

89.——Respondeat Superior.—Voluntary slander, uttered by employe, which had nothing to do with his employment, in which he was not engaged when he spoke, did not subject the employer to liability.—Lucas E. Moore Stave Co. v. Wells, Miss., 72 So. 228.

90.——Safe Place.—Where the foreman placed two gangs at work spiking rails 32 feet apart, but the rear gang worked up to the other, and one member was struck by a sledge, the employer was not chargeable with having placed the men in a dangerous place, in the absence of orders to work together or knowledge that the two gangs had worked together.—New York, C. & St. L. R. Co. v. Allen, Ind., 113 N. E. 315.

91.——Totally Disabled.—Evidence held to sustain finding that claimant who lost sight of one eye and 95 per cent of vision in other eye was permanently totally disabled.—State v. District Court, Blue Earth County, Minn., 158 N. W. 700.

92.——Workmen's Compensation Act.—Under Workmen's Compensation Law, § 3, subd. 3, defining "employer" as including the state, and subd. 5, defining "employment" as meaning employment in a business carried on for pecuniary gain, the state of New York, not being engaged in business for gain, is not liable to an injured state highway employe.—Allen v. State, N. Y., 160 N. Y. Supp. 85.

93.——Workmen's Compensation Act.—Under Workmen's Compensation Act, § 3, and section 2, group 30, providing for injuries in packing houses and abbatoirs the deceased, while on his way on foot to deliver meat from market, was not engaged in any act incidental to cutting and preparation of meat.—Newman v. Newman, N. Y., 113 N. E. 332, 218 N. Y. 325.

94.——Workmen's Compensation Act.—General workman, a plumber's assistant, injured while driving his employer's horse and wagon from a job to the shop, was injured "in the course of his employment," within Workmen's Compensation Act (St. 1911, c. 751, pt. 2, § 1), as amended by St. 1912, c. 571.—In re Sanderson's Case, Mass., 113 N. E. 355.

95.——Workmen's Compensation Act.—Under Workmen's Compensation Act, § 3, subd. 4, and section 2, group 41, where the deceased, although his principal duties were driving of a meat delivery wagon, was injured while on his way on foot to deliver meat, he was not entitled to compensation as being at the time engaged in the operation of a wagon propelled by a horse.—Newman v. Newman, N. Y., 113 N. E. 332, 218 N. Y. 325.

96.——Workmen's Compensation Act.—Injuries to express company's employe by being struck by automobile, while crossing street on his way from the express truck he drove to deliver package, arose out of his employment within the Workmen's Compensation Law.—Miller v. Taylor, N. Y., 159 N. Y. Supp. 999.

97.——Wrongful Discharge.—A contract of indefinite hiring may be shown by plaintiff's evidence in an action for wrongful discharge to have been for a definite term.—Reiss v. Usona Shirt Co., N. Y., 159 N. Y. Supp. 1031.

98. **Payment**—Burden of Proof.—A pro forma judgment for plaintiff is not overcome by a finding that defendant gave notes for the debt sued upon, where there is sufficient evidence to rebut the presumption of payment thereby created; for the burden of proving payment remained with defendant throughout the case.—Rutland Ry., Light & Power Co. v. Williams, Vt., 98 Atl. 85.

99. **Principal and Agent**—Notice to Agent.—Where a lessor's general agent for leasing properties knew of the illegal purpose for which a house was to be used, and aided in such purpose, such knowledge is binding upon the landlord.—Mitchell v. Campbell, Miss., 72 So. 231.

100. **Principal and Surety**—Release of Surety.—The surety on a builder's bond held not released because payments were made by the owner without the architect's certificate in violation of the contract, where only one payment was so made and that it was made on an itemized statement approved in writing by the architect.—Trustees of First Presbyterian Church of Duluth v. United States Fidelity & Guaranty Co., Minn., 158 N. W. 709.

101. **Railroads** — Humanitarian Doctrine. — Where deceased passed the caboose of defendant's train and went upon the trestle before the train backed up and no trainman was then at the rear end of the train to look for clear track or to avoid danger, deceased being "seeable" by the trainmen while in peril and in time to have averted his injury, the humanitarian doctrine applied.—Starks v. Lusk, Mo., 187 S. W. 586.

102.——Police Power.—Where alteration of grade crossing is reasonable exaction with reference to object to be obtained, expense is no reason against its legality, when order is based on police power.—Erie R. Co. v. Board of Public Utility Com'rs, N. J., 98 Atl. 13.

103.——Trespasser.—A pedestrian using a railroad bridge which was not the direct or most convenient way was negligent as matter of law barring recovery for death caused by passing train.—Darrington v. Chicago & N. W. Ry. Co., Minn., 158 N. W. 727.

104. **Receiving Stolen Goods**—Instructions.—Where, in a prosecution for receiving or concealing stolen goods, the alleged owner had never been in possession of the property, an affirmative charge was required.—Wade v. State, Ala., 72 So. 269.

105. **Release** — Fraud. — Misrepresentation made by claim agent of street railway to an injured passenger, that his physician had told the agent that he would be out and at work within two weeks, constituted fraud invalidating a release thereby procured.—Smith v. Rhode Island Co., R. I., 98 Atl. 1.

106. **Sales**—Estoppel.—A purchaser of a silo, agreeing by contract of sale, upon receipt, at once to give seller notice and reasonable time to replace missing parts, who received the silo, kept it three months, meanwhile paying a note for the price, and then, attempting to set it up, found parts missing, which the seller did not replace, was not estopped by delay to rescind.—Lake v. Western Silo Co., Ia., 158 N. W. 673.

107.——Express Warranty.—In an action for breach of warranty in the sale of logs, where an express warranty of the quality of the logs was established, an implied warranty could not be invoked.—Holt Lumber Co. v. Givens, Ala., 72 So. 257.

108.——Waiver.—Where plaintiff did not prove a delivery at the locality alleged, he cannot assert that plaintiff waived the place of delivery by absolutely refusing the goods, when such waiver has not been pleaded.—Roaring Fork Potato Growers v. C. C. Clemons Produce Co., Mo., 187 S. W. 617.

109. **Seduction**—Corroboration. — Letters alleged to have been written by defendant, identified only by the prosecutrix, being admissible only as part of her evidence and depending on her own testimony, cannot be regarded as corroborating the witness.—Lewis v. State, Miss., 72 So. 241.

110. **States**—Private Capacity. — The state, though not a corporation in the strict and subordinate sense of that term, may and does act as a corporate entity in a broad sense, when it engages in the construction of public works and binds itself generally by contract, in which case its acts are subject to the same principles as are acts of an individual.—City of Indianapolis v. Indianapolis Water Co., Ind., 113 N. E. 369.

111. **Street Railroads**—Action.—The violation by motorman of a railway company's rule to run slowly at a certain point does not of itself give an injured person a right of action.—Southern Traction Co. v. Wilson, Tex., 187 S. W. 536.

112. **Taxation**—Assessment.—The term "assessment" includes both preparation of list comprising description of persons or property liable and an estimate of value of the property.—Town of Albertville v. Hooper, Ala., 72 So. 258.

113. **Tenancy in Common** — Conversion.—Where defendant before and at time of attachment sale was in possession of the property as tenant in common, the fact that after sale on his writ of attachment he claimed to be the absolute owner did not constitute conversion.—Goodrich v. Chappell, Vt., 98 Atl. 46.

114. **Trusts**—Joinder of Parties.—Where title to shares in trust funds has been adjudicated, one to whom for convenience the fund has been intrusted cannot complain that, in suit to have certain shares of the fund transferred to guardian for certain cestuis, another cestui is not joined.—Austin v. Ennis, Mo., 187 S. W. 599.

115. **Vendor and Purchaser**—Equitable Interest.—Where a party contracted to buy premises, paying in installments, assuming a mortgage and taxes, and thereafter made payments, his equitable interest was not lost ipso facto, by his mere breach of agreement, without affirmative action by the seller.—W. F. Miller Co. v. Grussi, Conn., 98 Atl. 90.

116.——Vesting of Title.—Where shipment of hides was accompanied by draft for delivery on payment, and consignee borrowed money to pay the draft, giving trust receipt before title passed, the receipt was inoperative to vest title in the lender until title vested in the consignee, and thereafter could not deprive it of the vested title.—People's Nat. Bank of Boston v. Mulholland, Mass., 113 N. E. 365.

117. **Waters and Water Courses**—Surface Water.—Where no way of escape of surface water was shown to have existed since construction of railroad grade in 1871, the inference that it had been held back by the grade for the prescriptive length of time is not necessarily conclusive.—Hume v. Grand Trunk Western Ry. Co., Mich., 158 N. W. 840.

118. **Wills**—Agreement to Make.—An agreement based on valuable consideration to make a will in favor of another is valid, and damages are recoverable on its breach.—Ball v. James, Ia., 158 N. W. 684.

119.——Election.—To constitute election on part of widow whether she will take under her husband's will or claim a distributive share of the estate, she must be aware of the extent of the estate, and that she is choosing between two inconsistent rights.—Schubert v. Barnholt, Ia., 158 N. W. 662.